



Federal Communications Commission
Washington, D.C. 20554

May 30, 2008

DA 08-1232

In Reply Refer to:

1800B3-RH/GL/RFB/MFW

Released: May 30, 2008

Mr. William B. Clay
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In re: WNOW-FM (Formerly WAGI-FM),
Bessemer City, North Carolina
Facility ID No. 23006
Gaffney Broadcasting, Inc.
File No. BMPH-20070119ACY, as amended

**Application for Modification of
Construction Permit**

Gentlemen:

We have before us an application (the "Application") of Gaffney Broadcasting, Inc. ("GBI") for minor modification of construction permit for Station WNOW-FM, Gaffney, South Carolina, as amended on May 21, 2007, and October 26, 2007. In the Application, GBI proposes to relocate WNOW-FM from Gaffney, South Carolina, to Bessemer City, North Carolina.¹ Additionally, Mr. William B. Clay ("Clay") filed an Informal Objection (the "First Objection") to the original Application² and a "Petition to Deny" (the "Second Objection," collectively, the "Clay Objections") the Application as amended on October 26, 2007.³ For the reasons set forth below, we deny the Clay Objections and grant the amended Application.

¹ Also before us are one electronic mail and three letter comments on the proposal from WNOW-FM listeners who wish the station to remain in Gaffney. These comments were not served on GBI or its counsel. We believe it appropriate to treat these as comments of individual listeners pursuant to Section 1.1204(a)(8) of the Rules. The authors of these comments do not become parties to this proceeding by virtue of their comments. See Note 4 to Paragraph (d) of Section 1.1202 of the Rules, 47 C.F.R. § 1.1202.

² Clay filed the First Objection on April 17, 2007. After submitting a Motion for Extension of Time to which Clay did not object, GBI filed an Opposition to the First Objection on May 23, 2007, to which Clay filed a Reply on May 31, 2007.

³ Clay filed the Second Objection on November 28, 2007. GBI filed an Opposition to the Second Objection on December 12, 2007, to which Clay filed a Reply on December 26, 2007. Additionally, GBI filed a "Supplement" to its Opposition to the Second Clay Objection on April 28, 2008, to which Clay filed a "Reply" on May 7, 2008.

Background. WNOW-FM is licensed on Channel 287C (105.3 MHz)⁴ and is a pre-1964 grandfathered short-spaced facility with respect to third-adjacent-channel Station WKQC(FM), Charlotte, North Carolina, on Channel 284C. In February of 2006, GBI filed a modification application (the “2006 Application”) to relocate the WNOW-FM transmitter site and reduce the Station’s facilities to Class C0 status;⁵ the facility proposed in that application also would be short-spaced to WDCG(FM), Durham, North Carolina, but GBI proposed processing under the contour protection standards for short-spaced stations contained in Section 73.215 of the Commission’s Rules (the “Rules”).⁶ The staff granted that unopposed application on May 3, 2006.

Subsequently, GBI filed the Application, proposing to relocate WNOW-FM from Gaffney, South Carolina (where it is one of four stations licensed to Gaffney) to Bessemer City, North Carolina, as that community’s first local broadcast service. Initially, the Application proposed no changes to WNOW-FM’s technical facilities. By virtue of an amendment filed on October 26, 2007, however, GBI proposed to relocate WNOW-FM’s transmission facilities to the existing tower utilized by Station WBTV(TV), Charlotte, North Carolina, and specified Class C1 facilities. The amended Application also is short-spaced to Station WDCG(FM) and GBI proposes a directional antenna and processing under Section 73.215 of the Rules with respect to that station. It also claims that the staff need not consider the grandfathered short-spacing to WKQC(FM) pursuant to Section 73.213(a)(4) of the Rules in processing the Application.

During the pendency of the Application, four WNOW-FM listeners objected to the relocation of the station to Bessemer City, stating that they wish for the station to remain in Gaffney. In his First Objection, Clay, a resident of Charlotte, North Carolina, objects to the original Application primarily because he views it as the relocation of a small-town radio station into the much larger Charlotte, North Carolina, market. In his Second Objection, Clay reiterates his argument that according a “first local service” allotment preference to Bessemer City is unjustified, and he raises several additional claims, including that GBI did not have reasonable assurance of the site specified in either the initially-filed Application or the 2006 Application. Finally, Clay contends that the Station has provided little or no “local transmission service” to Gaffney, South Carolina since it changed to a Spanish-language format on April 21, 2007.

Discussion. Pursuant to Section 309(e) of the Communications Act of 1934, as amended (the “Act”), informal objections must provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity.⁷

⁴ See BLH-20040301ABW, granted on June 10, 2004.

⁵ See File No. BPH-20060210ABX. This application proposed Class C0 facilities of an effective radiated power of 100 kW at an antenna height above average terrain of 308 meters. It proposed to collocate transmission facilities with those of Station WBAV-FM, Gastonia, North Carolina.

⁶ 47 C.F.R. § 73.215. This application observed that the existing pre-1964 short-spacing to WKQC(FM) could be “ignored” pursuant to Section 73.213(a)(4) of the rules, which indicates that there are no distance-separation or interference protection requirements with respect to second- and third-adjacent channel short-spacings that have existed continuously since November 16 1964. See 47 C.F.R. 73.213(a)(4).

⁷ See 47 U.S.C. § 309(e). See also *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990), *aff’d sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *rehearing denied* (Sep. 10, 1993); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986)

Removal of WNOW-FM from Gaffney, South Carolina to Bessemer City, North Carolina. GBI filed this application pursuant to Section 73.3573(g) of the Commission's rules which permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file a competing expression of interest.⁸ This reallocation proposal, like all such proposals, must result in a preferential arrangement of allotments.⁹ We determine whether this is the case using the FM allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*.¹⁰ We find that grant of the Application would result in a preferential arrangement of allotments as required by *Community of License*. In doing so, we first find that Bessemer City is entitled to a preference as a first local service.

Bessemer City is located within the Gastonia Urbanized Area, and WNOW-FM's 70 dB μ signal will cover a substantial portion of both the Gastonia Urbanized Area and the Charlotte Urbanized Area. In awarding a Priority (3) preference to Bessemer City as a first local service, the Commission is concerned with the potential migration of stations from lesser-served rural areas to well-served urban areas. For this reason, the Commission will not blindly apply a first local service preference when a station seeks to reallocate its channel to a suburban community in or near an Urbanized Area. In such circumstances, the Commission requires the city of license modification proponent to submit a *Tuck* showing.¹¹ In evaluating these showings, the Commission considers the extent the station will provide service to the entire Urbanized Area, the relative populations of the suburban and central city, and most important, the extent to which the suburban community is independent of the Urbanized Area. In considering a reallocation proposal, the Commission takes into account the well established *Huntington* doctrine which operates as a limited exception to the normal Section 307(b)¹² presumption that every separate community is deserving of at least one local transmission service.¹³

Under the *Tuck* criteria, Bessemer City is entitled to consideration as a first local service. Bessemer City is located 26 miles from Charlotte and 7 miles from Gastonia. As a Class C1 facility, the proposed station would serve a significant portion of both Urbanized Areas. The Bessemer City population of 5,119 persons is significant and 0.9 percent of the population of Charlotte (540,828 persons

(informal objection must contain adequate and specific factual allegations sufficient to warrant the relief requested).

⁸ See 47 C.F.R. § 73.3573(g). See also *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Report and Order, 21 FCC Rcd 14212 (2006), permitting broadcast stations to propose community of license changes by minor modification application.

⁹ See *Modification of FM and TV Authorizations to Specify a New Community of License ("Community of License")*, Report and Order, 4 FCC Rcd 4870 (1989), *recon. granted in part*, Memorandum Opinion and Order, 5 FCC Rcd 7094 (1990).

¹⁰ *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88 (1988). The FM allotment priorities are: (1) First fulltime aural service, (2) Second fulltime aural service, (3) First local service and (4) Other public interest matters. Co-equal weight is given to Priorities (2) and (3).

¹¹ See *Faye and Richard Tuck*, Memorandum Opinion and Order, 3 FCC Rcd 5374 (1988) ("*Tuck*"); see also *Huntington Broadcasting Co., v. FCC*, 192 F. 2d 33 (D.C. Cir. 1951); *RKO General, Inc. (KFRC)*, Memorandum Opinion and Order, 5 FCC Rcd 3222 (1990).

¹² 47 U.S.C. § 307(b).

¹³ See *Tuck*, 3 FCC Rcd at 5376.

according to the 2000 U.S. Census) and 7.1 percent of the population of Gastonia (72,183 persons). These percentages are consistent with previous actions in which we considered a reallocation proposal as a first local service.¹⁴ Bessemer City is also sufficiently independent of both Urbanized Areas to justify consideration as a first local service. Bessemer City is not dependent upon either the Charlotte Urbanized Area or the Gastonia Urbanized Area for employment. According to the 2000 U.S. Census, 13 percent of the Bessemer City workforce work in Bessemer City and GBI has identified local businesses providing employment opportunities. Bessemer City has its own local government, consisting of a mayor and city council. Bessemer City also has its own police department, fire department, public works department, and recreation department. In addition, it has its own zip code, post office, local newspaper, and library. The Gaston County School Board of Education administers the community's four public schools. The applicant has also identified local businesses, civic organizations and churches.

In his Objections, Clay argues that GBI intends to serve the Charlotte and Gastonia Urbanized Areas and not provide a local service to Bessemer City. At this juncture, we cannot deny the proposed reallocation on the basis of speculation that Station WNOW-FM will not provide a local service to Bessemer City. Notwithstanding the fact that as a Class C1 facility, Station WNOW-FM will provide a signal to a large area, Station WNOW-FM is required to provide a local service to Bessemer City.¹⁵ While we no longer require a licensee to adhere to detailed ascertainment procedures, meet non-entertainment programming guidelines or maintain detailed programming logs, various Commission rules are designed to ensure that broadcast stations serve their licensed communities. Each licensee is required to list in its public inspection file the programs that have addressed the most significant community issues during the previous three months.¹⁶ These lists are retained in the public inspection file until final action on the station's renewal application. This represents a significant and meaningful requirement for GBI to serve Bessemer City. This also provides a tangible means for the residents of Bessemer City and the Commission staff to evaluate Station WNOW-FM's record of service in connection with its application for renewal of license.

Accordingly, we find that Clay has failed to raise a substantial and material question of fact calling for further inquiry regarding the removal of WNOW-FM from Gaffney, South Carolina, to Bessemer City, North Carolina.

Compliance with Section 73.3573(g)(4). Section 73.3573(g)(4) of the Rules¹⁷ requires that all applications proposing to change the community of license of an existing FM station "must demonstrate the existence of a suitable assignment or allotment site that fully complies with Sections 73.207 . . .

¹⁴ See e.g., *Park City, Montana*, Report and Order, 19 FCC Rcd 2092 (MB 2004) (finding that Park City, with a population of less than 1 percent of Billings and located 21 miles from Billings, is independent of the Billings Urbanized Area); *Ada, Newcastle and Watonga, Oklahoma*, Report and Order, 11 FCC Rcd 16896 (MMB 1996) (finding that Newcastle, with a population of less than 1 percent of Oklahoma City and located 15 miles from Oklahoma City, is independent of the Oklahoma City Urbanized Area).

¹⁵ See e.g., *In the Matter of Broadcast Localism*, Notice of Inquiry, 19 FCC Rcd 12425 (2004).

¹⁶ See *Deregulation of Radio*, Report and Order, 84 FCC 2d 968 (1981), *recon. granted in part*, Memorandum Opinion and Order, 87 FCC 2d 796 (1981), *aff'd in relevant part*, *Office of Communications of United Church of Christ v FCC*, 707 F.2d 1413, 1435 (D.C. Cir. 1983).

¹⁷ 47 C.F.R. § 73.3573(g)(4).

without resort to Sections 73.213 or 73.215.” Accordingly, applications proposing to change community of license must demonstrate the existence of a suitable assignment site that fully complies with the spacing requirements contained in Section 73.207 of the Rules.¹⁸ An engineering study of the proposed assignment site – WNOW-FM’s current license site – reveals that it fails to meet the minimum spacing requirements of Section 73.207. Specifically, the assignment site is short-spaced by 4 kilometers to the third-adjacent Class C license¹⁹ of WKQC(FM), Charlotte, NC. The required spacing pursuant to Section 73.207 is 105 kilometers while the actual spacing proposed in the application is 101 kilometers. GBI recognizes this violation and requests a waiver of Section 73.3573(g)(4).

In support of the waiver request, GBI states that its assignment site is at the same location as its licensed facility. Furthermore, GBI indicates that this site is pre-1964 grandfathered short-spaced to WKQC pursuant to Section 73.213(a).²⁰ GBI cites a 1992 allotment case, *Newnan and Peachtree City, Georgia*,²¹ as evidence of the Commission’s willingness to allow pre-1964 grandfathered short-spaced stations to change community of license “provided that [an assignment site is specified where] no new short-spacings are created, no existing short-spacings are exacerbated, and the potential for interference between the currently short-spaced stations is not increased.” Accordingly, GBI concludes that by proposing its licensed site as the assignment site for its community change application, these criteria are met, and thus, the request for waiver of Section 73.3573(g)(4) is warranted in this instance.

In the Second Objection, Clay claims that neither the assignment nor application site proposed by GBI complies with the distance separation requirements contained in Section 73.207 of the rules. Therefore, Clay argues, the proposal violates Section 73.3573(g)(4), and a waiver of that rule is not justified. Clay claims that a *Newnan* waiver is not justified in this case. Clay cites Example 15 of the Media Bureau’s “*Examples PN*,”²² which presents an example of a grantable application in which a pre-1964 grandfathered short-spaced station proposes a community of license change and “does not propose any technical facility modifications.”²³ Clay states that GBI’s application proposes substantial technical facility modifications and thus, is not covered by Example 15 of the *Examples PN*. Furthermore, Clay believes that GBI’s proposed facility fails to comply with the criteria established in *Newnan* by creating a new short spacing with the first-adjacent channel Class C1 license of WDCG(FM), Durham, North Carolina.²⁴ Although GBI’s application requests processing pursuant to the contour overlap provisions of Section 73.215,²⁵ Clay argues that Section 73.215 cannot be applied when citing *Newnan*. Therefore, Clay requests dismissal of GBI’s application.

¹⁸ 47 C.F.R. § 73.207.

¹⁹ BLH-19920416KB.

²⁰ 47 C.F.R. § 73.213(a).

²¹ *Newnan and Peachtree City, Georgia*, 7 FCC Rcd 6307, 6308 (1992)(“*Newnan*”).

²² See *Media Bureau Offers Example to Clarify the Treatment of Applications and Rule Making Petitions Proposing Community of License Changes, Channels Substitutions, and New FM Allotments*, Public Notice, 22 FCC Rcd 6852 Example 15 (MB 2007) (“*Examples PN*”).

²³ The Bureau indicated that although such a proposal would violate the assignment reference site requirement of Section 73.3573(g)(4), the staff will consider waiver request in accordance with the policy set forth in *Newnan*. *Id.*

²⁴ BLH-20080310ADT.

Contrary to Clay's arguments, we find that GBI's application complies with the precedent established in *Newnan*. Section 73.3573(g)(4) requires that an assignment site comply with Section 73.207. GBI submits its pre-1964 grandfathered short-spaced license site as its assignment site and requests waiver of Section 73.3573(g)(4). In *Newnan*, the Commission granted a Section 73.207 spacing waiver and allowed a station that proposed its pre-1964 grandfathered short-spaced licensed site as its assignment site to modify its community of license. Furthermore, by proposing its licensed site as its assignment site, GBI clearly does not create a new short-spacing, exacerbate any existing short-spacings, or increase the potential for interference between the short-spaced stations.

Clay overreads and misapplies Example 15 to the facts of this case. The *Examples PN* presented various scenarios to provide guidance for the application of the new rules instituted by the *Report and Order* in MB Docket 05-210.²⁶ The fact that "Station A" in Example 15 does not include technical changes while proposing a waiver of Section 73.3573(g)(4), citing *Newnan*, does not establish a bar on technical changes in connection with *Newnan*-type Section 73.3573(g)(4) waivers. The example simply illustrates the requirement that a community change applicant's proposed assignment site comply with the criteria established in *Newnan*. Although GBI's application site creates a new short spacing which necessitates the use of Section 73.215, the currently licensed WNOW-FM assignment site clearly follows the *Newnan* precedent.

On this last point, Clay also argues that use of 73.215 is inappropriate for *Newnan*-type community of license change applications. Clay is incorrect. As stated above, Section 73.3573(g)(4) requires only that an assignment site comply with the spacing requirements in Section 73.207 without resort to Sections 73.213 or 73.215. It says nothing about specification of an application site, and use of Section 73.215 is perfectly appropriate in evaluating the application site of a *Newnan*-type community change application. Here, GBI's assignment site complies with Section 73.207. Moreover, we have evaluated the proposed application site and find that it complies with Section 73.215 with respect to WDCG(FM).

When an applicant seeks waiver of the rules, it must plead with particularity the facts and circumstances which warrant such action.²⁷ We have afforded GBI's request for waiver of Section 73.3573(g)(4) the requisite "hard look,"²⁸ and we find that the facts and circumstances presented here are sufficient to warrant waiver under the precedent described above. Accordingly, we will deny Clay's Second Objection on this point and grant GBI's request for waiver of Section 74.3573 (g)(4) of the Rules.

Site Availability. In the Second Objection, Clay, citing the Instructions for FCC Form 301, states that all applicants for broadcast facilities must have a reasonable assurance that the specified site will be available at the time they file FCC Form 301.²⁹ He observes that the WNOW-FM construction permit

²⁵ 47 C.F.R § 73.215.

²⁶ *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Service*, Report and Order, FCC 06-163 (rel. Nov. 29, 2006)(*"Report and Order"*).

²⁷ *Columbia Communications Corp. v. FCC*, 832 F.2d 189, 192 (D.C. Cir. 1987) (quoting *Rio Grand Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 644, 666 (D.C. Cir. 1968) (*per curiam*)).

²⁸ See *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

²⁹ Second Objection at 6, citing General Instruction L to FCC Form 301.

specifies an antenna located on a tower owned by CBS Communication Services, Inc.,³⁰ and that the original Application and first amendment likewise specified that site. However, Clay submits an excerpt from the transcript of a June 19, 2007, public hearing before the Gastonia, North Carolina City Council.³¹ In that hearing, an attorney representing tower owner Crown Castle, testified that his client, Davidson Media, LLC (“Davidson”),³² considered the CBS tower as a possible location for a broadcast facility. However, Davidson terminated discussions after CBS proposed a restriction prohibiting the Davidson station from broadcasting in a Spanish-language format. Clay argues that this testimony puts in issue GBI’s reasonable assurance of the site specified in the construction permit and the original Application. Clay observes that GBI amended the Application on October 26, 2007 to specify a different site.³³ Clay asserts that the Commission should dismiss or designate for evidentiary hearing the Application on the site availability issue, and he further argues that the Commission should consider revoking the WNOW-FM construction permit under Section 312(a)(7) of the Act.³⁴

In its Opposition, GBI argues that the submitted testimony is not probative because: (1) it is not the testimony of a person who has any business or legal relationship to the tower owner; and (2) there is nothing in the testimony to indicate that the declarant had any first-hand knowledge of the terms of a tower lease agreement between GBI and the tower owner. GBI states that it had, and still has, reasonable assurance from CBS to use its tower. It states that it obtained such assurance in February of 2006 through its representative, Scott Knoblauch.³⁵ In fact, GBI states that it negotiated a draft lease with CBS for space on the CBS tower, which lease did not contain a prohibition on using Spanish-language formats. In a Supplement filed on April 28, 2008, GBI submits: (1) a copy of the draft lease;³⁶ and (2) a February 7,

³⁰ Clay correctly references Antenna Structure Registration No. 1008247. The Coordinates of the site are 35° 15’ 57” North Latitude, 81° 16’ 35” West Longitude.

³¹ Second Objection at 5-6 and Exhibit F, Minutes of the June 19, 2007, meeting of the Gastonia City Council, pp. 367 and 375-385.

³² The declarant indicates that the owner of WNOW-FM had contracted to sell the station to Davidson, which intended to relocate the station to the Gastonia area. The Commission granted an application (File No. BTCH-20070504ACW) to transfer control of the licensee to Davidson on October 18, 2007. *See Letter to Peter Davidson et al.*, 22 FCC Rcd 18605 (MB 2007). The parties have not yet notified the Commission of the consummation of this transaction.

³³ Clay also argues that GBI violated section 1.65 of the Rules, 47 C.F.R. § 1.65, which requires applicants to keep their applications current and report any significant changes within 30 days. He states that Gaffney amended the Application to specify a new site on October 26, 2007, more than five months after it must have become aware that the CBS site would not be available for use by its Spanish-language station.

³⁴ 47 U.S.C. § 312(a). This provision states that the Commission may revoke any station license or construction permit for, *inter alia*, “conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit in an original application.”

³⁵ Opposition at 6.

³⁶ Supplement to Opposition, Exhibit 1. The draft lease, dated March 28, 2006, does not specifically reference GBI as prospective Lessee; rather, the space for the name of the lessee is blank.

2006, electronic mail communication from Glynn Walden, Senior Vice President of Engineering for CBS Radio, to Scott Knoblauch, indicating that “after having discussed [WNOW-FM’s] proposal to lease space on the WBAV tower, CBS Radio would be willing [to] enter into a tower lease subject to a written lease with acceptable terms and conditions.”³⁷

An applicant seeking a new broadcast facility must possess “reasonable assurance” of the availability of its proposed transmitter site at the time it files its application.³⁸ While some latitude is afforded such “reasonable assurance,” there must be, at a minimum, a “meeting of the minds resulting in some firm understanding as to the site’s availability.”³⁹ A mere possibility that the site will be available is not sufficient.⁴⁰ Although the Commission repealed the requirement that broadcast applicants certify the availability of the transmitter site when it adopted its competitive bidding procedures,⁴¹ the Commission’s basic “reasonable assurance” standard remains unaltered.⁴² The instructions to FCC Form 301 underscore this requirement.

It is clear from the information provided in GBI’s April 28, 2008, Supplement that GBI and CBS had a “meeting of the minds resulting in a firm understanding” as to the availability of the WBAV site. The fact that the parties did not finalize the arrangements and that GBI ultimately found another location for WNOW-FM is irrelevant. Clay’s argument regarding the availability of the WBAV tower requires no further discussion.

Provision of Local Service. Finally, Clay argues that WNOW-FM’s programming source and format changed to Spanish-language programming on April 21, 2007, and the Station has provided little or no “local transmission service” to Gaffney, South Carolina since that date. He states that, as of November 16, 2007, WNOW-FM’s public inspection file contained no record of transmission service after April 20, 2007. Additionally, he states that, after “four hours of careful listening to WNOW-FM on November 12 and 16, 2007, he heard no mention of Gaffney except for hourly station identification.”⁴³

³⁷ *Id.*, Exhibit 2.

³⁸ See, e.g., *Port Huron Family Radio, Inc.*, Decision, 66 RR 2d 545 (1989); *Radio Delaware, Inc.*, Memorandum Opinion and Order, 67 RR 2d 358 (1989). See also *William F. Wallace and Anne K. Wallace*, Memorandum Opinion and Order, 49 FCC 2d 1424, 1427 (1974) (“*Wallace*”); *South Florida Broadcasting Co.*, Memorandum Opinion and Order, 99 FCC 2d 840, 842 (1984) (specification of site is an implied representation that site is available).

³⁹ *Genesee Communications, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 3595 (1988). The applicant need not own the proposed site and may even work out the final details for a lease sometime in the future. The “reasonable assurance” standard is satisfied by “[s]ome clear indication from the landowner that he is amenable to entering into a future arrangement with the applicant for use of the property as its transmitter site, on terms to be negotiated” *Elijah Broadcasting Corp.*, Memorandum Opinion and Order, 5 FCC Rcd 5350, 5351 (1990).

⁴⁰ See *Wallace*, 49 FCC 2d at 1425.

⁴¹ See *Implementation of Section 309(j) of the Communications Act*, First Report and Order, 13 FCC Rcd 15920 (1998).

⁴² See *Liberty Productions, A Limited Partnership*, Memorandum Opinion and Order, 16 FCC Rcd 12061, 12084-85 (2001).

⁴³ He indicates that WNOW-FM is marketed as a Charlotte, North Carolina station broadcasting a “regional Mexican format,” but that the station’s promotional materials do not mention the proposed community of license, Bessemer City. Second Objection at 8.

Clay argues that the Commission must require GBI to demonstrate when, and how, it has provided local transmission service to Gaffney prior to determining if will provide such service to its prospective community of license, Bessemer City.

In its Opposition, GBI discounts Clay's attempt to question whether GBI will serve the local interests of Bessemer City based on its alleged failure to provide local service to Gaffney. The Commission, states GBI, focuses on the needs of the new community and will not speculate on the intent of the applicant in serving the new community based on an evaluation of programming to its existing community of license.⁴⁴ Such arguments are more appropriately raised in connection with a station's license renewal application than at the allotment or application stage of the licensing process.⁴⁵

Clay's argument is without merit. The Commission has addressed similar arguments previously.⁴⁶ The importance of our Section 307(b) criteria, as discussed above, is directly tied to the fact that broadcasters must provide programming that is responsive to the interests and needs of their communities of license, and the concomitant importance of local radio service to the communities served.⁴⁷ GBI's Application did not include a programming proposal. However, FCC Form 301 does not require such a certification when proposing a facility modification.⁴⁸ As indicated in *Suburban Community* and affirmed in *WBBK Broadcasting*, the Commission presumes that an applicant for a new station construction permit or a proposed station buyer will meet its local programming obligations on the basis of certain application representations and the satisfaction of certain technical requirements. As we also noted in *Suburban Community* and *WBBK Broadcasting*, an alleged failure actually to serve the community of license is more appropriately addressed in the context of a license renewal challenge.⁴⁹

Moreover, with respect to Clay's contention regarding GBI's current service, Clay has failed to meet his burden of raising a substantial and material question of fact calling for further inquiry. The mere fact that a small, selected sample of WNOW-FM's newscasts contained no programming specifically directed to Gaffney does not demonstrate that the station is failing in its obligation to provide relevant programming to Gaffney residents or that it will fail to provide programming to Bessemer City residents.

Conclusion/Ordering Clauses. We have evaluated the Application and find that it complies with all pertinent statutory and regulatory provisions and that its grant would further the public interest, convenience, and necessity. Accordingly, for the reasons set forth above, IT IS ORDERED, that the Informal Objections filed by William Clay on April 17, 2007, and November 28, 2007, ARE DENIED.

⁴⁴ Opposition at 6-7, citing *Suburban Community Policy, the Berwick Doctrine, and the De Facto Reallocation Policy*, Report and Order, 93 FCC 2d 436 (1983) ("*Suburban Community*").

⁴⁵ *Id.* citing *Wilburton, Okemah, and McAlester, Oklahoma*, Report and Order, 21 FCC Rcd 5127 (MB 2006).

⁴⁶ See *WBBK Broadcasting, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 5906 (2000) ("*WBBK Broadcasting*").

⁴⁷ See, e.g., *Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Report and Order, 21 FCC 14212, 14214 (2006).

⁴⁸ See, e.g. Instructions for FCC Form 301 (January 2008).

⁴⁹ *Suburban Community*, 93 FCC 2d at 456.

IT IS FURTHER ORDERED, that the informal objections of Hazel Bryant, Mickey Clayton, Todd G. Crump, and Rev. James McAdams ARE DENIED.

IT IS FURTHER ORDERED, that the application (File No. BMPH-20070119ACY) of Gaffney Broadcasting, Incorporated for minor modification of the facilities of Station WNOW-FM, Gaffney, South Carolina, IS GRANTED.

Sincerely,

Peter H. Doyle, Chief
Audio Division
Media Bureau

cc: Gaffney Broadcasting, Inc.
Ms. Hazel Bryant
Mr. Mickey Clayton
Mr. Todd G. Crump
Rev. James McAdams